NOV 22 19
JOHN F. DAVIS, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

875

JOHNNY B. DAPPER

vs.

CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Johnny B. Dapper (1958
In propria persona
Viejas Rehabilitation Center
R F D Route 1 Box 485
Alpine, California 92001

I N D E X

	Page
OPINIONS BELOW	1
JURISDICTION	1
REHEARING DENIED EXTENTION GRANTED	1
STATEMENT	3
STATUTE INVOLVED	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	6
APPENDIX	8

CASES

PEOPLE vs RING 26 C.A. 2d 768

STATUTES

UNITED STATES CONSTITUTION AMENDMENT XIV 1, 2

CALIFORNIA PENAL CODE SECTION 26, 1127, 1368, 1387 2

CALIFORNIA PENAL CODE SECTION 1387 1, 3, 6

CALIFORNIA PENAL CODE SECTION 363, 1272, 1496 6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

JOHNNY B. DAPPER
vs.
CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE

SUPREME COURT OF THE UNITED STATES

Johnny B. Dapper, in propria persona the petitioner here in prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California, entered on May 28, 1969. (In Re Dapper 71 A. C. 197)

GROUNDS FOR JURISDICTION

The California Supreme Court erred in its judgment of May 28, 1969. By allowing to stand, two, of three previously dismissed counts. Which were reinstated into criminal complaint M 43578 by stipulation between City attorney and Court appointed counsel. Over the strong objection of your petitioner. Said Court did not carefully review that and other questions involving due process of law, presented by petitioner. And he was not given a full and complete hearing.

REHEARING DENIED - EXTENTION GRANTED

A petition for a rehearing was denied on June 25, 1969. An order granting extention of time to petition for a Writ of Certiorari. To and including November 22, 1969 was made by Mr. Justice Thurgood Marshall on September 24, 1969.

STATUTORY PROVISION

Petitioner deems his due process rights guaranteed under the XIV Amendment of the United States Constitution, to have been violated by the California Supreme, and Courts below. Thereby confering jurisdiction on this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Can dismissed misdemeanor counts be reinstated by stipulation. California Penal Code Section 1387

2. Can the jury be charged with oral instructions in a

criminal case, without defendant's consent, with instructions requested orally in absence of defendant. Penal Code 1127

3. Can one agency of government prosecute for a crime, which is the direct result of the action of another branch of the government. California Penal Code section 26 par. 4 and 6.

4. Can appellant's specifications of ground of appeal be eliminated from the settled statement. California Rules of appeals to Superior Court: Rules 184, 187, and 189.

5. Can trial Court order hearing to determine sanity of defendant three months after judgment. Penal Code sec. 1387.

LAW THE CASE INVOLES

United States Constitution, Amendment XIV, Due Process.

California Penal Code Sections 26, 1127, 1368, and 1387.

Section 26. (Who are capable of committing crimes) All persons are capable of committing crimes except those belonging to the following classes:

Four. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

Six. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Section 1127. (Instructions: How given:) All instructions given shall be in writing unless there is a phonographic reporter present and he takes them down, in which case they may be given orally; provided however, that in all misdemeanor cases oral instructions may be given pursuant to stipulation of the prosecuting attorney and counsel for the defendant.

Section 1368. (Question of sanity to be submitted when doubt arises prior to judgment:) If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant.

Section 1387. (Order of dismissal as bar to other prosecution An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony.

California Rules of appeals to Superior Court: Rule 187; "The appellant's specifications of grounds of appeal shall not in any case be eliminated from the settled statement."

STATEMENT OF THE CASE

Second paragraph of the Opinion of California Supreme Court in this case, In re Dapper Criminal 12720 states: "Dapper pleaded guilty to and was sentenced on counts 1 and 5. The other counts were dismissed "in furtherance of justice? . .

Will the Court please see: 1. Notice of Appeal and designation of the Record M 43578 filed March 9, 1967. and: 2. Opinion of the Superior Court Appellate Department CR-11288 filed April 25, 1967. The COURT: Defendant in effect contends that certain misrepresentations were made to him which induced his entry of a plea of guilty to counts 1 and 5 of the complaint. . . Also please see: 3. Defendant's Proposed Statement and Declaration filed March 13, 1967 see page 2 line 7 "Upon Court being reconvened, defendant accepted prosecutions offer to enter a plea, it having been represented to defendant by prosecutor that the Court would not sentence defendant to jail nor would prosecutor ask that defendant be sentenced to jail and all witnesses would be excused, and defendant believed said representations, relied on same, and except for said representations would not have changed his plea.". .

Continuing with second paragraph of the Opinion of the California Supreme Court: "Upon Dapper's petition, the Court granted a petition for a writ of error coram nobis, including in its order a stipulation by the City attorney and Dapper's Court-appointed counsel that the dismissed counts be reinstated." This also is in error; the writ of coram nobis was granted without argument, and then a separate order allowing the stipulation reinstating the three dismissed counts was made.

Please see respondent's brief: dated September 7, 1967. page 2 line 10. "Without argument the court granted defendant's motion and the judgment and all proceedings were set aside. It was stipulated by both counsel(. . . for defendant; . . . for the people) that all counts be reinstated in lieu of filing a new complaint alleging the counts which had been dismissed." Also please see page four of respondent's brief. The foregoing surely substantiates what petitioner has pointed out; that the stipulation took place after writ was granted

And please see: Petition for rehearing filed June 12, 1969. on page 4 line 15 "Hearing held May 25, 1967. Court granted motion without argument. And then directed a very vituperate personal attack upon the defendant. After that the stipulation of the reinstatement of the dismissed counts took place, over the strong objection of your petitioner.

The foregoing certainly questions that part of the fifth paragraph of California Supreme Court Opinion which states; "The reinstatement of the dismissed charges may have been an integral part of the order granting the writ, and had Dapper attacked the order on the basis of the part reinstating the charges, the entire order may have been held inseverable."

Your petitioner questions, why did, the Court give this part of the Opinion based, on supposition, when the facts were available. ?

In the same paragraph (5) the Opinion of the California Supreme Court further states; He did not appeal the order granting the writ or move to set aside the order and vacate the writ. He has attacked only the portion of the order which based on the stipulation, directed reinstatement of the dismissed charges. He has never argued that the order should be set aside in its entirety. Instead, he has taken advantage of the order by withdrawing his guilty pleas and proceeding to trial on the merits of all of the charges. We are satisfied that in the circumstances of this case he may not be permitted at this time to attack the order granting the writ after he has taken advantage of those portions which are favorable to him.

Petitioner could clearly see the logic of the foregoing were it true or factual. However as he has shown, the stipulation was not connected with the order granting the writ and had the Court carefully perused the lower Court records, it would have discovered the facts.

So of course petitioner did not appeal the order granting the writ. But of course he did attack the reinstating of of the dismissed charges. Please see "Appellant's opening brief," filed August 28, 1967. And "Appellant's second brief filed September 13, 1967.

Paragraph six of the California Supreme Court Opinion: "The decision of the attorney to enter into the stipulation, even if beyond his authority, does not show that he was incompetent. The record does not show that counsel was unaware of the facts or the law applicable to the coram nobis proceeding and, so far as it appears from the record, the determination to enter into the stipulation may have been the wisest course to follow to secure the vacation of defendant's convictions.

Again in the Opinion reverts to supposition. Of course it was beyond attorneys authority to enter into the stipulation. And it surely was not the "wisest course to follow". . .

Petitioner questions, to the why, of such effort to justify the "stipulation" in the California Supreme Opinion. ?

Petitioner is puzzled by the statement; "The record does not show that counsel was unaware of the facts applicable to Coram nobis proceeding. . . (what record) ?

The "Certificate" issued by the Clerk of the California Supreme Court, does not list any of the papers refered to by petitioner in the foregoing several paragraphs and he wonders did that Court see these papers, if not, how could it give a fair Opinion concerning the dismissed counts, ?

NO PROVISION IS MADE IN PENAL CODE FOR REINSTATEMENT OF ACTION IN MISDEAMEANORS AFTER DISMISSAL: Section 1387 supra

People vs Ring 26 C.A. 2d 768

1/ Where a defendant moves to dismiss each of the three counts of a complaint on the ground that it states no public offense, without any trial, thus terminating the action, as far as those offenses are concerned. . .

TIME QUESTION OF DUE PROCESS RAISED

All the following issues involve denial of due process and were raised in the Municipal Court and the Superior Court Appellate Department, during the year of 1967.

Petitioner forced from former rented location, land taken for freeway construction, he believes Penal Code Section 26 applies, and he raised this point at the following times. (Please see Application fo Hearing on Habeas Corpus)

Feb., 28, 1967 At first trial.
March 13, 1967 Defendant's proposed Statement and Declaration
April 21, 1967 Appeal Hearing, Superior Court
June 12, 1967 Second Trial, Same Complaint
July 5, 1967 Probation Hearing
July 12, 1967 Proposed Statement on Appeal
Aug., 28, 1967 Appellant's Opening Brief
Sept., 13, 1967 Appellant's Second Brief
Sept., 15, 1967 Appeal Hearing, Superior Court
July 1, 1968 Petition for writ of Habeas Corpus Court of Appeal - Fourth District
July 16, 1968 Application for Hearing Supreme Court, CA.
April 2, 1968 Hearing Supreme Court California.
June 12, 1968 Petition for Rehearing Supreme Court, CA.

Objection to stipulation and or, reinstating dismissed charges raised on the foregoing dates from June 12, 1967, on. And May 25, 1967 at petition for writ of coram nobis Hearing

A charge of the denial of due process in routine procedure, was at the following times and places, made by petitioner

March 9, 1967 Notice of Appeal, Designation of Record
March 13, 1967 Defendant's proposed Statement
June 12, 1967 At Trial in Municipal Court
July 6, 1967 Notice of Appeal
July 12, 1967 Proposed Statement on Appeal
Aug., 28, 1967 Appellant's opening Brief
Sept., 13, 1967 Appellant's second Brief
Sept., 15, 1967 Appeal Hearing, Superior Court
July 16, 1968 Application for Hearing, Supreme Court, CA.

The issue of Jury instructions was raised in the following briefs.

July 12, 1967 Proposed Statement on Appeal
Sept., 13, 1967 Appellants second brief

REASONS FOR GRANTING THE WRIT

Petitioner believes he has shown that: The first six paragraphs of the California Supreme Court Opinion, In re Dapper, criminal 12720, does not reflect an opinion based on law and fact but, rather one based on supposition, in allowing counts to stand that were reinstated, over the objection of petitioner. In violation of Penal Code section 1387. Althought the Court did grant petitioner the writ of Habeas Corpus but remanded case to Court below to "enter judgment" on these reinstated counts, (not pronounce sentence) as the lower Court chose to interpret. Because of this petitioner is now in illegal custody. No bail set as required by Penal Code 1272 (bail on appeal). And also in violation of Penal Code 363 and 1496, which forebids taking one into custody for same cause. After being granted the writ of Habeas Corpus. Sentence was pronounced while petitioner was at home. He was seized by marshals with illegally issued warrant as he was leaving Superior Court from a writ of prohibition hearing concerning a new complaint for the same facts (double jeopardy).

Petitioner believes this Court will agree that, the State Court has departed from the accepted and usual course of judicial proceedings. And in effect has sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

Petitioner wishes to make known to this Court that, he has prepared this petition while in illegal custody here at Viejas Honor Camp. He surely wishes to make known to this Court the fine people that staff this Honor Camp system of San Diego County, your petitioner has nothing but praise for everyone here, and extra praise for those who go out of their way to be helpful, nice and compassionate for our problems.

Petitioner is cut off from from free access to the law library so has little or no case authority to cite, he feels they are of no real need as this Court is very well able to adjudicate these matters without them.

And will the Court please take note that petitioner did not receive order extending time to file until Oct., 26, 1969 although it was made by Mr. Justice Marshall on Sept. 24, 1969. All because of this illegal custody. And because time has run he has not been able to deal fully with other issues mentioned. But trusts that enough has been presented to grant him the relief that he needs, to receive complete vindication.

Respectfully Submitted,

Johnny B. Dapper

Johnny B. Dapper 19588

Alpine, California
November 19, 1969

APPENDIX

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE JOHNNY B. DAPPER)
) CRIMINAL 12720
ON HABEAS CORPUS)

Johnny B. Dapper petitions for a Writ of Habeas Corpus.

In August 1966, he was charged with five counts of violating the San Diego Municipal Code: Count 1 (§ 55.30.10), permitting combustible material and debris to accumulate; Count 2 (§ 55.36), allowing rubbish to remain without a permit; Count 3 (§ 55.30.7(c), storing lumber without a permit; Count 4 (§ 44.0350), accumulating debris so as to afford a shelter for rats; and Count 5 (§ 55.35), allowing dangerous weeds.

Dapper pleaded guilty to and was sentenced on Counts 1 and 5. The other Counts were dismissed "in furtherance of justice". Upon Dapper's petition, the Court granted a petition for a writ of error coram nobis, including in its order a stipulation by the City attorney and Dapper's Court-appointed counsel that the dismissed counts be reinstated.

A jury trial was held, and Dapper was found guilty on all five counts. On count 1, he was sentenced to pay a fine of $500 and serve 180 days in jail; execution of judgment was stayed, and he was placed on probation for three years. On count 5, he was sentenced to 180 days in jail; except for three days, execution of sentence was stayed, and he was placed on probation for three years. The sentences were to run consecutively. As a condition of probation, he was required " to clean up his property."

Dapper contends that he could not be validly prosecuted under counts 2, 3, and 4, because section 1387 of the Penal Code bars the refiling of misdemeanor complaints which have been dismissed. 1/ He argues that the stipulation to the reinstatement of the dismissed counts is invalid, because it was made over his objection, and shows incompetence of counsel. However, even assuming that Dapper objected to the stipulation at the time it was made and that because of his objection it was improper for counsel to enter into the stipulation, Dapper may not in this proceeding attack the stipulation, and the

1/ Section 1387 of the Penal Code states: "An order for the dismissal of the action, made as provided in this chapter: is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony."

stipulation does not show incompetence of counsel.

The granting or denying of a petition for writ of error coram nobis is an appealable order, governed by the same procedural rules that apply to appeals from a judgment of conviction. (People v. Griggs, 67 Cal.2d 314,316; In re Horowitz, 33 Cal. 2d. 534, 537.) The reinstatement of the dismissed charges may have been an integral part of the order granting the writ, and had Dapper attacked the order on the basis of the part reinstating the charges, the entire order may have been held inseverable. (Cf. Hamasaki v. Flotho; 39 Cal.2d 602 608-610; People v. Domingues, 256 Cal.App.2d 623,629; People v. Williams, 247 Cal.App.2d 394, 409-410; People ex rel. Dept of Public Works v. Mascotti, 206 Cal.App.2d 772, 778 - 779; People v. Mason, 184 Cal. App.2d 182,187.) He did not appeal the order granting the writ or move to set aside the order and vacate the writ. He has attacked only the portion of the order which, based on the stipulation, directed reinstatement of the dismissed charges. He has never argued that the order should be set aside in its entirety. Instead, he has taken advantage of the order by withdrawing his guilty pleas and proceeding to trial on the merits of all of the charges. We are satisfied that in the circumstances of this case he may not be permitted at this time to attack the order granting the writ after he has taken advantage of those portions which are favorable to him.

The decision of the attorney to enter into the stipulation, even if beyond his authority, does not show that he was incompetent. The record does not show that counsel was unaware of the facts or the law applicable to the coram nobis proceeding, and, so far as appears from the record, the determination to enter into the stipulation may have been the wisest course to follow to secure the vacation of defendant's convictions. (Cf. In re Hawley, 67 Cal. 2d 824, 828 - 829.)

Dapper further contends that the municipal court had no jurisdiction to prosecute him under San Diego Municipal Code sections 55.30.10, 55.36, 55.30.7(c), and 55.35 because, although the provisions were in effect when the violations were allegedly committed, "on or about" June 30,1966, the sections were repealed June 20, 1967, before the prosecution of Dapper had been reduced to final judgment in October 1967. This contention does not apply to count 4, accumulating debris so as to afford a shelter for rats, because that section has not been repealed. . . .

In the interest of brevity several paragraphs of this California Supreme Court opinion are omitted as they have no bearing on the issues raised in this petition. For complete text of this opinion, see In re Dapper, 71 A.C. 197.

. . .Dapper's further contentions that he was denied a fair trial, was inadequately represented by counsel, was convicted based on false testimony, and was subject to cruel and unusual punishment, are without merit.

Because of our disposition of this matter, we need not reach Dapper's final contention that the sentences imposed on counts 1 and 5 were cumulative punishment for the same offense, in violation of section 654 of the Penal Code. 5/

The writ is granted. The Appellate Department of the Superior Court of San Diego County is directed to recall the remittitur in case number Crim. 12056 to vacate the convictions and judgments on count 1 and count 5, to vacate the conviction on count 3, and to remand the case to the municipal court to enter judgment on count 2 and count 4 in accordance with the views expressed herein.

WE CONCUR:
TRAYNOR, C.J.
TOBRINER, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.

PETERS, J.

CONCURRING AND DISSENTING OPINION BY McCOMB, J.

I concur in that part of the opinion that upholds the convictions on count 2 and 4. I dissent from that part of the opinion that directs the court to vacate the convictions and judgments on counts 1 and 5 and to vacate the conviction on count 3.

5/ Dapper has not been sentenced on either of the valid convictions (counts 2 and 4). It would be premature for this court to decide whether separate sentences for these counts would violate section 654. We must assume that any sentence by the trial court will be consistent with the requirements of section 654.

VERIFICATION

I Johnny B.Dapper the petitioner have made and read this petition. The foregoing is true of my own knowledge except as to those matters stated herein on my information and belief, and as to those matters,I believe it to be true.I declare under penalty of perjury that the foregoing is true and correct.

Johnny B. Dapper

Alpine, California
November 19, 1969.

Johnny B. Dapper